United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES D. CANNON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 18,402

955

APPEAL FROM A JUDGEMENT IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WILMER B. HILL
529 Transportation Building
Washington, D.C. 20006
ATTORNEY FOR THE APPELLANT,
APPOINTED BY THE U.S. COURT
OF APPEALS.

OF COUNSEL:
AMES, HILL & AMES
529 Transportation Building
Washington, D.C. 20006

Statement of Questions Presented

1. The question is whether the court erred in failing to order the entry of a judgement of acquittal on count (2) of the indictment at the conclusion of the Government's case, on the grounds that the Government did not make a prima facie case of housebreaking.

2. The question is whether the court erred in failing to order the entry of a judgement of acquittal on count (3) of the indictment after the verdict of the jury, on the grounds that a verdict of guilty of simple assault was not supported by any evidence.

3. The question is whether the conduct of Government's counsel during the trial and the rulings of the court with respect to said conduct were such that the rights of the accused were substantially prejudiced.

4. The question is whether the failure of the court-appointed attorney for the accused to call the accused as a witness in his own defense deprived said accused of a fair trial.

TABLE OF CONTENTS

TABLE OF CASES CITED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES D. CANNON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee

No. 18,402

BRIEF

Comes now Charles D. Cannon, hereinafter referred to either as Cannon or as appellant, and, by his attorney, Wilmer B. Hill, files this his opening brief on appeal to this Honorable Court from judgement on conviction of housebreaking and simple assault in the United States District Court for the District of Columbia. It is the position of appellant that he was improperly convicted of said offenses, and that the conviction should be reversed by this Honorable Court.

JURISDICTIONAL STATEMENT

This appeal is being prosecuted under Title 18, United States Code, Part II, Section 3732. By order dated January 6, 1964, in Crim. No. 892-63, the United States District Court for the District of Columbia ordered that appellant here be authorized to proceed on appeal without prepayment of costs.

STATEMENT OF CASE

A. The Proceedings

By indictment filed September 24, 1963, in Crim. No. 892-63, Charles D. Cannon was charged with the following counts:

(1) Assault with intent to commit robbery. (22 D.C. Code 501):

(2)&(4) Housebreaking (22 D.C. Code 1801), 2 counts:

(3) Assault with a dangerous weapon. (22 D.C. Code 502):

(5) Larceny (22 D.C. Code 2202).

Trial was conducted before the Honorable Luther Youngdahl, United States District Judge, at the United States Court House, Washington, D.C., on November 12 and 13, 1963. Defendant entered a plea of not guilty to all counts. Judge Youngdahl ordered the entry of judgement of acquittal on counts (4) and (5). The jury found the defendant not guilty under count (1), guilty of housebreaking under count (2) and guilty of simple assault, rather than assault with a dangerous weapon, under count (3).

On December 16, 1963, Judge Youngdahl entered judgement by committing defendant to the custody of the Attorney General or his authorized representative pursuant to Section 5010 (b), Title 18 of the U.S. Code under the provisions of the Federal Youth Corrections Act.

B. Summary of Trial Record

There were no exhibits received in evidence. We shall here summarize the testimony which bears on the questions which we present for consideration by this Honorable Court.

1. Winona G. Buckman testified that she owns the property at 1360 Harvard Street, N.W., Washington, D.C., where the alleged housebreaking and assault occurred on July 21, 1963. Between 3:30 and 4:00 AM that day this witness awakened when she heard dresser drawers being opened. This occurred only 2 or 3 inches from where she lay in the bed. A man went to the foot of the bed, and then came back at the witness with a knife. He pulled her dress up and suggested that they engage in sexual intercourse. He admonished the witness not to holler or she would be cut with the knife. Then he partially opened the witness's blouse. All this time he had a knife in his right hand. He proceeded to look for money under the pillow. After inquiring as to the age of one of the children he left the room, still brandishing the knife. The witness was able to see from a 15-watt light in the hallway. The bedroom door was open. The defendant was identified as the man who did this. At about 3:55 AM the police were called.

Mrs. Buckman testified that she had earlier testified in General Sessions Court that one James Reid could have been the one who broke into her apartment. The witness could not identify any of the clothes worn by the person who broke into her place except for a white T-shirt. James Reid was also identified by Mrs. Buckman as the probable party who broke in, while he was in the custody of police on July 21, 1963. James Reid and the accused here have very similar features. (Transcript p. 51-66).

2. Robert Taylor testified that he lives at 1360 Harvard Street, N.W., in the house right next to Mrs. Winona Buckman. Sometime between 3:00 and 4:00 AM he saw a boy come out the window in Mrs. Winona Buckman's house. He was about 3 feet from where this happened when he observed it. The accused was identified as the one he saw. He had previously seen him around the neighborhood.

Mr. Taylor was unable to describe any of the clothing worn by the person he saw come out of the window. There was some light in the room from which the person came. When the police brought James Reid around to be identified Mr. T Taylor positively stated that Reid was the one he saw come out of the window. He testified that Reid and Cannon look alike.

(Transcript, P. 69-91).

(Transcript, P. [illegible])

3. Mr. James R. Clark, a detective assigned to the 10th Precinct, testified on direct examination that he showed certain photographs to Robert Taylor, as follows:

Q. Did you show him certain photographs?

A. I did.

Q. Did he identify one of those photographs?

MR. MILLER: Your honor, I object to that.

THE COURT: Overruled.

BY MR. REZNECK:

Q. Did he identify one of those photographs?

A. He did.

Q. Whose photograph was it that he identified?

A. The defendant, Charles Desinore Cannon.

Q. Do you see that man here today?

A. Yes, sir.

Q. Point him out, please.

A. Sitting over there next to Mr. Miller at the table.

(Transcript, P. 95).

On redirect examination, there was the following colloquy:

Q. Was this other man Reid released as a result of the hearing that you held?

MR. MILLER: Your Honor, I object to that. May we approach the bench?

MR. REZNECK: I think it is material.

THE COURT: Yes, you may approach the bench.

At the bench, the court advised Mr. Rezneck not to press the question, and he did not.

(Transcript, P. 99).

4. Mr. George W. Mitchell, an attorney-at-law, testified for the defense. He represented James Reid at a preliminary hearing in the Court of General Sessions. Mrs. Winona Buckman testified at this hearing that James Reid was the one who broke into her house. There was a positive identification at that time. (Transcript, P 115-118).

5. There is a discussion involving the Court, counsel for the defendant, and the defendant with regard to whether he should testify in his own defense. It was the decision of counsel for the defendant that because of certain confidential communications between them he could not place his client on the witness stand.

(Transcript, P. 118-123).

6. There was rebuttal argument by counsel for the Government:

MR. REZNECK: There has been no showing this defendant was anywhere else on that second night.

There is no alibi that has been offered to put him anywhere else than where Mr. Taylor says he was, coming out of that window three feet away, with the light, the bright light, as Mr. Taylor said, behind him.

I submit to you Mr. Taylor ought to be believed and that his testimony convicts this defendant, not on speculation, not on surmise, not on guesswork, but on solid evidence beyond a reasonable doubt that this defendant was the man who came into Mrs. Buckman's apartment in the way that she described, and who assaulted her with a knife.

Now defense counsel tells you this is a pretty important case to one person in the room, and by that he means the defendant. But it is also a pretty important case to the people who were victimized, the citizens of this community who must not be vicitimized in the future by such conduct.

(Transcript, P. 150, 151).

7. The Court gave certain instructions to the jury:

If, however, you do not unanimously conclude that the Government has proved beyond a reasonable doubt that the defendant is guilty of assault with

a dangerous weapon under count three, the Court is submitting under this count also the lesser included offense of simple assault.

If you unanimously conclude that the Government has proved beyond a reasonable doubt that the defendant is guilty of simple assault under count three, than your verdict would be guilty of that offense under count three.

(Transcript, P. 170, 171).

STATUTES, TREATIES, REGULATIONS, OR RULES INVOLVED

District of Columbia Code, 1961, Title 22, Section 1801: Housebreaking.

> Whosoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shops, stable or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, cahal boat, vessel, [redacted] or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

United States Code, Title 18, Part II,

Federal Rules of Criminal Procedure, Rule 52(b):

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

Constitution of the United States, Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF POINTS

1. The court erred in failing to order the entry of a judgement of acquittal on count (2) of the indictment at the conclusion of the Government's case because the Government did not present sufficient evidence to establish that there was housebreaking with intent to steal property of another.

2. The court erred in failing to order the entry of a judgement of acquittal on count (3) of the indictment after the verdict of the jury because a verdict of guilty of simple assault was not supported by any evidence.

3. The right of the accused to a fair trial was substantially prejudiced by the conduct of Government's counsel during the trial and the rulings of the court with respect to said conduct.

4. The accused was deprived of a fair trial by failure of his court-appointed attorney to call the accused as a witness in his own defense.

SUMMARY OF ARGUMENT

The court should have directed a judgement of acquittal on count (2) of the indictment, charging housebreaking with intent to steal property of another, for two reasons. First, there is insufficient identification of the accused as the one who allegedly engaged in the housebreaking. Secondly, the evidence fails to show that there was intent to steal the property of another at the time the alleged breaking and entering occurred.

The court should have directed a judgement of acquittal on count (3) of the indictment after the verdict of the jury. The indictment charged the defendant with assault with a dangerous weapon. The jury's verdict was guilty of simple assault. There was absolutely no evidence to support this verdict. It was either assault with a dangerous weapon or no assault at all.

The appellant is entitled to a new trial because there are certain statements and questions by Government's counsel and answers to certain questions which should not have been allowed. There are injurious inferences and impressions which could have been drawn by the Jury. These involve hearsay evidence, the right of the accused not to testify, and other matters.

[redacted]

The appellant is entitled to a new trial because his court-appointed attorney did not place him on the stand as a witness in his own defense. This did not involve a question of trial technique, but rather the attorney's decision that he could not put him on the stand because of certain confidential communications. Even though the jury was properly instructed by the court on this subject, the jury may nevertheless be influenced by the defendant's failure to take the stand.

ARGUMENT

Point 1.

With respect to Point 1, appellant desires the court to read the following pages of the reporter's transcript: Tr. 51-66 inclusive, 69-91 inclusive, 115-118 inclusive.

At the conclusion of the Government's case, attorney for the defendant moved for judgement of acquittal on counts 2, 3, 4, and 5. The motion was granted as to counts 4 and 5, and denied as to the others. The motion should also have been granted as to count 2.

There is not sufficient evidence to establish that the accused committed this crime of housebreaking with inte intent to steal the property of another. There must be sufficient identification of the accused as the one who actually engaged in the housebreaking. The prosecution attempted to establish this identification through the testimony of witnesses Winona Buckman and Robert Taylor. Witness Buckman's observation of the accused took place while both the witness and the accused were in a darkened room at about 3:00 AM. The only light was from a 15-watt bulb in the hallway. The only identification as to clothing was that the intruder had on a white T-shirt. On two occasions prior to the trial witness Buckman identified a

James Reid as the one who had broken in. Although she denies that her identification of Reid was positive, another witness, George W. Mitchell, testified that here identification of Reid on one occasion was positive. There is no evidence that witness Buckman was acquainted with the accused, or would have any particular ability to recognize him.

Robert Taylor testified that he saw a boy come out of a window in Mrs. Buckman's house around the time the crime was alleged to have taken place. Although there was a light in the house from which the boy came he was in the window when first seen, so the light must have been behind him. It would have been very difficult to recognize his features. Witness Taylor was unable to describe any of the clothing worn by the person he saw. When the police brought James Reid around to his place the next day, witness Taylor positively identified Reid as the one he had seen.

This type of identification falls far short of being sufficient to support a conviction. It is obvious that the conditions must have been such that adequate identification could not have been made by witnesses Buckman and Taylor. This explains why each of them had earlier positively identified someone else as the party involved. The identification of Reid was made when the image should have been much fresher in these witnesses'

minds.

In Reamer v. United States, 229 F. 2d 884, and People v. Bryan, 27 Ill. 2d 191, 188 N.E. 2d 592, the court reversed convictions because of insufficient identification.

One of the essential elements in the crime of housebreaking is intent. Accused was charged here with housebreaking with the intent to steal property of another. The Government must prove that at the time the breaking and entering occurred Cannon had the intent to steal property which was located in the Buckman house. We have no evidence that the accused had evolved any plan to rob this or any other house. There is no evidence that while in the Buckman house the invader had possession at any time of property belonging to another. All the evidence points to the fact that the primary concern of the invader was a sexual relationship with Mrs. Buckman rather than theft of property. Any attempt to locate money or other goods of value was clearly an afterthought, and only incidental to the primary purpose for breaking and entering.

Failure to establish an essential element of the crime charged requires that the court hand down judgement

of acquittal, and not turn over the case to the jury on that count. There was not sufficient evidence for the jury to make findings of fact with respect to the crime charged in count 2, and the court should have entered judgement of acquittal.

While normally an appellate court will not review or disturb inferences of fact drawn from the evidence by the jury, it will examine the record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. Mortensen v. United States, 322 U.S. 369, 64 S. Ct. 1037.

Point 2.

With respect to Point 2, appellant desires the court to read the following pages of the reporter's transcript: Tr. 51-66 inclusive, 170, 171, 175.

Count 3 of the indictment charges that the accused made an assault on Winona G. Buckman with a dangerous weapon, namely a knife. The accused was convicted of simple assault. The Court had charged the jury that it could find the accused guilty of the lesser crime of simple assault rather than assault with a dangerous weapon. When the attorney for the defendant moved for a judgement of acquittal on count 3 after the verdict of the jury the court refused to grant the motion

because said attorney had not objected to the instruction before it was given to the jury.

Considering the evidence in this case the court's instruction on count 3 was clearly erroneous. Even though attorney for defendant did not make a timely objection before the instruction was given to the jury there is no reason why the court could not have cured the improper instruction by rendering judgement of acquittal after the verdict.

In a trial for assault with a dangerous weapon, the District Court is not required by criminal procedure rules to instruct the jury that they may find defendant guilty of the lesser offense of simple assault and should not so instruct them, in absence of evidence justifying conviction of simple assault. Mac Illrath v. United States, 88 U.S. App. D.C. 270, 188 F.2d 1009.

The evidence here clearly established that if any crime was committed it must have been assault with a dangerous weapon. If the jury did not believe that the accused was guilty of assault with a dangerous weapon he should have been found not guilty on count 3.

From the moment that witness Buckman challenged the presence of the intruder in her bedroom he exhibited a knife. The testimony is very clear that the intruder

had the knife in his right hand and kept it in the view of Mrs. Buckman at all times. Several of the comments attributed to the defendant were with reference to use of the knife if Mrs. Buckman hollered or tried to follow him when he left. The Government attorney was very careful to establish that the knife contributed to and was in fact an integral part of the alleged assault. Any and all advances made on Mrs. Buckman were made while the knife was drawn and in view.

How, then, could there possibly have been an assault which was merely a simple assault, and not with a dangerous weapon? With no evidence of simple assault the court should have entered a judgemnnt of acquittal notwithstanding the verdict.

Point 3.

With respect to Point 3, appellant desires the court to read the following pages of the reporter's transcript: Tr. 95, 99, 150, 151.

There are a number of instances on the record where the prosecutor, through improper questions or statements, prejudiced the rights of the accused. The court should have sustained objections to certain questions, and instructed the jury to disregard certain statements of the prosecutor.

The duty of the prosecuting attorney is not to convict defendants, but to try them fairly. McFarland v. United States, 80 U.S. App. D.C. 196, 150 F. 2d 593. If the prosecuting attorney asks questions and makes statements which are clearly improper the defendant is not getting a fair trial. This is what has occurred here.

When Government counsel, at TR. 95, interrogated witness Clark with respect to identification of a photograph by witness Taylor he was eliciting hearsay evidence which was not admissible through any exception to the hearsay rule. Defense objection to this line of questioning was overruled. Witness Clark testified as to what some other person did with respect to a photograph not properly identified on this record. By allowing Clark to say that Taylor identified Cannon from some picture the court allowed inadmissible evidence which was highly prejudicial to the defendant. It was error not to have sustained the defense objection.

When Government counsel, at TR. 99, asked witness Clark whether Reid was released as the result of a hearing the defendant was again prejudiced. Objection was timely made by the defense, and the court advised

Government counsel at a bench conference not to press the question. However, the damage was done. Inasmuch as both Reid and the defendant had at some time been identified by two Government witnesses as the one they saw, any statement which would leave an impression with the jury that Reid was innocent would in turn leave an impression that the defendant must have been the one. Even though the question was not answered the idea was planted in the minds of the jury. A motion for a mistrial at this point would have been in order. Although the motion was not made at trial this Honorable Court can, in the exercise of sound discretion, note the error. Miller v. United States, 38 App. D.C. 361, 40 L.R.A., N.S. 973. At the very least the trial court should have instructed the jury to completely disregard the question, and attach no significance to it.

Where the Government counsel in his closing argument to the jury, TR. 150, noted that there was no evidence to show that the defendant was anywhere else but where the Government witnesses placed him, it was a reflection on the defendant's failure to take the stand. Although there was no direct reference to this failure the fact was cleverly brought to the jury's attention through this statement. The privilege of

defendant against self-incrimination and its corollary, the prohibition against comment by government counsel on his failure to testify, will be protected by the courts. Tomlinson v. United States, 68 App. D.C. 106, 93 F. 2d 652. The government may not call to the attention of the jury defendant's failure to testify in a criminal case. Van Storey v. United States, 77 A. 2d 318. This should include an indirect as well as a direct call. The Constitution of the United States, Fifth Amendment, gives rise to this protection.

Where the Government counsel in his closing argument to the jury, TR. 150, made reference to his own conclusion that the testimony of Mr. Taylor ought to be believed it was improper and prejudicial to the defendant. The prosecutor should not substitute his conclusion for a conclusion which the jury may or may not reach.

Where the Government counsel in his closing argument to the jury, TR. 150, 151, makes reference to people being victimized, and that they must not be victimized in the future he exceeds the bounds of fair argument. He is in effect asking the jury to try the defendant for crimes which he might commit in the future. There is no basis in the record for even

implying that the defendant would so conduct himself in the future. There is nothing in the record to show that the defendant has a history of such conduct.

Proper objection could have been made to all the argument noted above. The fact that there were no objections by the defense at trial does not preclude us from raising these points at this time. Rule 52(b) of the Federal Rules of Criminal Procedure provides that plain errors affecting substantial rights can be noticed in the appeals court. This includes objections to argument of prosecuting counsel to which no objection had been made in trial court. Shelton v. United States, 83 U.S. App. D.C. 257, 169 F. 2d 665.

Error is presumed injurious unless it appears beyond doubt that it did not and could not cause prejudice. Parlton v. United States, 64 App. D.C. 169, 75 F. 2d 772.

It can easily be recognized that we have here a difficult case because of the distinct possibility of mistaken identity. The jury retired at 10:31 AM to deliberate on the verdict. They did not return with a verdict until 3:55 PM the same day. Obviously, it was not easy for them to reach a verdict. We urge

that the language of the Supreme Court of the United States in Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, be carefully noted:

> Where the scales of justice are delicately poised between guilt and innocence, error which under some circumstances would not be ground for reversal cannot be brushed aside as immaterial.

Point 4.

With respect to Point 4, appellant desires the court to read the following pages of the reporter's transcript: Tr. 118-123 inclusive.

The point here is that the accused did not receive a fair trial inasmuch as his court-appointed attorney declined to place him on the witness stand. While it is true that the accused agreed that it was better for him not to take the witness stand he was no doubt unable to appreciate the possible effect this could have on the jury. Even though the jury was properly instructed by the court that the defendant's failure to take the stand was not to be construed in any way against him it is difficult for a juror not to wonder why the defendant stands mute. The obvious impression is that if the defendant were innocent he would have no qualms about taking the stand and declaring his innocence.

The decision of the defense attorney was not reached because the accused had a criminal record which would be opened to the jury. Neither was it a matter of trial technique resulting from counsel's fear that defendant would not make a good impression on the stand, or could not stand up under cross-examination. There were confidential communications between attorney and client which placed the attorney in a position where he felt he could not ethically examine the defendant.

Admittedly this is a difficult situation, and this argument is not to be construed as criticism of the defense attorney for his conduct. Nevertheless, we earnestly feel that if defendant had been allowed to testify his statement of innocence could have been enough to weigh the scales in his favor. In our opinion, this is a close and difficult case, and the defendant needs and is entitled to all the assistance and guidance which he can obtain from his own counsel, the officers of the court, and the court itself.

We are unable to find any precedent on this point in this jurisdiction. We believe that this Honorable Court has the duty to face this issue here.

CONCLUSION

In conclusion your appellant respectfully urges that this Honorable Court find error in the trial proceedings and set aside the judgement on counts 2 and 3.

WHEREFORE, your appellant prays that the relief herein sought be granted, and that the judgement of the United States District Court for the District of Columbia Circuit be reversed.

Respectfully submitted,

WILMER B. HILL,
529 Transportation Building
Washington, D.C., 20006
ATTORNEY FOR THE APPELLANT,
APPOINTED BY THE U. S. COURT
OF APPEALS.

OF COUNSEL:
AMES, HILL & AMES
529 Transportation Building
Washington, D.C., 20006

DATED AT:
Washington, D.C.
March 30, 1964

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES D. CANNON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 18,402

APPEAL FROM A JUDGEMENT IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WILMER B. HILL
529 Transportation Building
Washington, D.C., 20006
ATTORNEY FOR THE APPELLANT,
APPOINTED BY THE U.S. COURT
OF APPEALS.

OF COUNSEL:
AMES, HILL & AMES
529 Transportation Building
Washington, D.C. 20006

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES D. CANNON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 18,402

REPLY BRIEF

Comes now Charles D. Cannon, hereinafter referred to either as Cannon or as appellant, and, by his attorney, Wilmer B. Hill, files this his reply brief on appeal to this Honorable Court from judgement on conviction of housebreaking and simple assault in the United States District Court for the District of Columbia.

An opening brief was filed by appellant, and the appellee in turn filed a brief. Oral argument was presented by both sides on May 5, 1964. It is the purpose of the instant pleading to answer certain of the arguments advanced by appellee in support of its position. Repetition of the preliminary portions of our earlier brief would serve no useful purpose.

ARGUMENT

I. The evidence of housebreaking and simple assault was not legally sufficient and the instruction on the lesser included offense of simple assault was not properly given.

Two witnesses for the prosecution did identify the defendant at trial as the person who participated in the alleged crimes here under consideration. However, we emphasize again that witness Buckman, on two earlier occasions, and witness Taylor, once previously, had identified a James Reid as the person who had been seen by them on the night in question. Obviously, then, there is some doubt as to whether it was Charles Cannon or James Reid who was actually seen by witnesses Buckman and Taylor.

In view of the decisions in Reamer v. United States, 229 F. 2d 884, and People v. Bryan, 27 Ill. 2d 191, 188 N.E. 2d 692, where the courts reversed convictions because of insufficient identification let us closely examine the facts surrounding the encounters between Buckman and the person alleged to be the defendant, and Taylor and the same. The conditions were such that neither witness was in position to make a valid identification. When Buckman saw the person in her bedroom the only light was from a 15-watt bulb in the hallway outside the bedroom. The only recollection which Buckman had of the clothes worn by the intruder was that he had on a white T-shirt. Twice Buckman identified James Reid as the intruder. Both these occasions were much closer to the time of the alleged crimes then was the identification of Cannon at trial.

Witness Taylor was able to see a "boy" come out of a window in the Buckman house. The light was in back of this person which meant that his features could not be easily seen, if at all. Taylor could not identify any of the clothing worn by the individual seen even though he was supposedly only a few feet away. Taylor on the following day identified James Reid.

We are not suggesting that the witnesses for the prosecution were anything but honestly mistaken in their various identifications of witnesses. We do suggest that these witnesses are unable to make positive identifications because of the time of the night, the poor lighting, and the fact that they were undoubtedly less wide-awake than they would have been during the daytime.

The situation here is analogous to that in the Reamer case, supra, where the Court held that the identification of the accused was "so pregnant with danger of honest mistake that it fails to qualify as dependable substantial proof that appellant was one of the bank robbers."

We agree with appellee that only where the evidence precludes the possibility of guilt of a lesser included offense is it error to submit the case to the jury on that offense.

Only one witness testified with respect to the alleged assault and that was Mrs. Buckman. If her testimony is to be believed the intruder at all times had a knife drawn and in his right hand. The prosecutor emphasized this in his questioning and in his summation to the jury. If we are to disbelieve her

reference to the knife must we not also disbelieve the rest of her story of what transpired? The jury could not disbelieve that the intruder was brandishing a knife and yet reasonably believe that the balance of what she related was true.

Even though defense counsel agreed to the instruction on the lesser crime of simple assault he later realized that he erred in so agreeing and requested that a judgement of acquittal notwithstanding the verdict be handed down. It was error not to do so.

II. <u>The testimony pertaining to appellant's photograph was hearsay and was also otherwise prejudicial to appellant</u>.

The testimony elicited from witness Clark with respect to the identification of a photograph by another person is most assuredly hearsay. In one breath the appellee states that this is primary evidence, and, in the next breath states that it is merely cumulative evidence offered to corroborate some other evidence. However, there is nothing in the testimony of witness Taylor, either on direct or cross, to indicate that he ever identified a photograph of the appellant.

By bringing up the subject of photograph identification the prosecutor was attempting to plant in the minds of the jury the thought that Cannon had some sort of record with the Police Department. Otherwise, why would they have his photograph? This was definitely prejudicial to the rights of the defendant.

III. The prosecutor's question regarding a former suspect in the case who had been released and comments by the prosecutor in his summation to the jury were prejudicial to appellant.

It makes no difference that the subject of a former suspect first arose during cross-examination by defense counsel. This cross-examination was designed to elicit testimony that the Government witnesses had earlier positively identified the former suspect. Even though there was no answer to the question concerning the release of the former suspect injury to the rights of appellant had already occurred.

We renew our contention that the trial court should have sua sponte declared a mistrial. We agree with appellee that whether to declare a mistrial is within the discretion of the trial judge. In McIntosh v. United States, 114 U.S. App. D.C. 1, 309 F. 2d 222 (1962), cited by the appellee, a mistrial was not declared because the direct evidence against the defendant was very strong. The evidence against the appellant here is not strong, and it was unquestionably prejudicial not to have declared a mistrial.

We also renew our contention that the court should have at least instructed the jury to disregard the question. Perhaps this omitted instruction standing alone would be insufficient cause to warrant reversal. However, together with the other errors which were committed it forms the basis for reversal.

The prosecutor's remarks with reference to the importance of this case to the victims of the alleged crimes here, and the

victims of future crimes were not proper. These remarks powerfully suggest that the crimes with which appellant is here charged are part of a series which will continue unless a conviction is obtained. There is no evidence that the appellant has in the past even been charged with these or any other crimes.

In United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), cited by appellee, the court held that the case against defendants was not so weak as to make it probable that the improper remarks of counsel must have influenced the jury's verdict. There was also an instruction to the jury on the point in question. The contrary is true in the instant case.

IV. The remarks of the prosecutor in his closing argument which referred to appellant's failure to testify constituted error which was not cured by any instruction to the jury.

The defendant's privilege against self-incrimination has been clearly abridged by the prosecutor's comments which would normally be construed to reflect on his failure to testify.

The accused could very well have been the only one in position to contradict the government's testimony. The alleged crimes took place between 3:30 and 4:00 AM. It is common knowledge that the average person is asleep at this hour and alibis are not normally available. The fact that the defendant's foster-mother was able to supply an alibi for the time during which some other alleged crime took place the preceding night, but not for the night here in issue, should not work to the disadvantage of the appellant. On the preceding night witness Andrews happened to return home very late from a party and found

the defendant asleep in the living room. The odds against this occurring on two consecutive nights are great indeed.

Peden v. United States, 96 U.S. App. D.C. 27, 223 F. 2d 319 (1955), cited by appellee, is not in point. It involves a situation where certain remarks were allegedly made by the defendant at the time of arrest.

The instruction to the jury that defendant's failure to take the stand should in no way prejudice him did not cure the impression left on the minds of the jury by the prosecutor. The opinion of human beings, once formed, cannot be that easily erased.

V. Appellant was denied effective assistance of counsel.

We are not accusing trial counsel for the defendant of any incompetency or lack of skill. The court-appointed attorney could not, in good conscience, because of a confidential communication between the defendant and him, examine the defendant. Certainly, it would not be ethical for the attorney to elicit testimony which he knows to be false. On the other hand, the defendant should be free to make his statement. This, then, is not a question of trial tactics. The defense attorney could not put the witness on the stand.

Although there was no objection raised at trial it can be raised now. In Mitchell v. United States, 104 U.S. App. D.C. 57, 259 F. 2d 787 (1958), cited by appellee, denial of effective assistance of counsel was not directly attacked on appeal, but rather collaterally by motion to vacate.

CONCLUSION

WHEREFORE, it is respectfully submitted and your appellant prays that the judgement of the United States District Court be reversed.

WILMER B. HILL,
529 Transportation Building
Washington, D.C. 20006
ATTORNEY FOR THE APPELLANT,
APPOINTED BY THE U.S. COURT
OF APPEALS.

OF COUNSEL:
AMES, HILL & AMES
529 Transportation Building
Washington, D.C. 20006

DATED AT:
Washington, D.C.
May 11, 1964

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,402

CHARLES D. CANNON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
DANIEL A. REZNECK,
GERALD E. GILBERT,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the evidence was sufficient to support a conviction for housebreaking and simple assault as a lesser included offense of assault with a dangerous weapon where: (a) the complaining witness's testimony provided all of the necessary elements directly implicating the defendant in both offenses; (b) appellant was seen climbing out of a window of the complainant's home by a neighbor who had seen the appellant on frequent prior occasions; and (c) defense counsel agreed to have the court submit the lesser included offense to the jury?

2) Whether the trial court erred in allowing a police officer to testify that a photograph which a previous witness had identified was appellant's photograph, where no other mention was made at trial of this identification?

3) Whether there was prejudicial error when the prosecutor: (a) questioned a government witness in reference to a former suspect in the case who had been released, and the question was objected to and withdrawn without a motion for a mistrial; and (b) commented in his closing argument that a government witness should be believed, and that the outcome of the case was important to the people who were victimized by the crimes?

4) Whether the prosecutor's comment, in his closing argument, that there had been no showing that appellant was anywhere other than where the government's witnesses had placed him, constituted comment on appellant's failure to take the witness stand?

5) Whether appellant was denied effective assistance of counsel by counsel's failure to call him to the stand, when appellant himself told the court that after consulting with counsel he had decided on his own not to testify?

INDEX

TABLE OF CASES

Cases—Continued — Page

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,402

CHARLES D. CANNON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 24, 1963, appellant was indicted for assault with intent to commit robbery (22 D.C.C. 501), assault with a dangerous weapon (22 D.C.C. 502), two counts of housebreaking (22 D.C.C. 1801), and petit larceny (22 D.C.C. 2202). Trial by jury began on November 12, 1963. A verdict of guilty on one count of housebreaking and a lesser included offense of simple assault was returned by the jury on November 13, 1963.[1]

[1] A motion for judgment of acquittal was granted by the court at the close of the Government's case on one housebreaking count and

On December 16, 1963, the appellant was placed in custody of the Attorney General as a youth offender pursuant to Title 18 U.S.C. § 5010(b).

The Government introduced the following evidence to support the housebreaking and simple assault verdict:

Mrs. Winona G. Buckman testified that sometime between 3:30 and 4:00 A.M. on July 21, as she lay sleeping in her second floor bedroom apartment with her four children, ages 3, 4, 6, and 9, she was awakened by a noise (Tr. 51-55). When she opened her eyes she saw the appellant opening and looking over the top of the drawers of a dresser which was only a few inches from her bed (Tr. 55). She asked him what he was doing there and he approached her bed and stood over her with a knife in his hand. He pulled her dress up and made an illicit remark and she told him to leave upon which he threatened to cut her if she hollered (Tr. 56-57). He started opening her blouse, was again told to leave and again threatened to cut her if she hollered. He searched the pillow she was lying on and asked her if she had any money, to which she replied no. He inquired as to the age of the 9 year old girl, and then proceeded to leave the room threatening to cut Mrs. Buckman if she followed him (Tr. 57).

The bedroom door was open into the hallway and a light was on in the hallway enabling Mrs. Buckman to see the appellant and she identified the appellant as the man who had done this (Tr. 58-59). After appellant left, Mrs. Buckman locked her door, went downstairs, awakened her husband, and called the police at about 3:55 A.M. (Tr. 59-60). Mrs. Buckman stated that she had previously identified a James Reid as the man who had done

---

the petit larceny charge, both of which had allegedly occurred on July 21, 1963. The jury returned a verdict of not guilty on the charge of assault with intent to commit robbery which allegedly had occurred on July 20, 1963, a separate date and circumstance from the other offenses.

this but was not positive about that identification. She said James Reid and the appellant looked alike but when she later saw the appellant she knew from his appearance and actions that it was he who had been in her apartment that morning (Tr. 62-66). Robert Taylor, a next door neighbor of Mrs. Buckman, testified that he lay down about 3:00 or 3:30 A.M. and twenty to twenty-five minutes later he heard a noise coming from next door. When he looked out he saw the appellant coming out of the window of Mrs. Buckman's home. The appellant was about two to three feet away from Mr. Taylor (Tr. 71-72). Mr. Taylor had seen the appellant frequently in the neighborhood and knew his nickname (Tr. 73). When Mr. Taylor saw appellant climbing out the window, appellant was facing out with his back to the inside of the house (Tr. 76-77). There were lights on inside the house appellant was coming from (Tr. 78). Mr. Taylor testified that he had previously identified a James Reid as being the man he saw coming from the house; however, he had not seen him long before the first identification, and Mr. Reid and appellant looked alike (Tr. 82-84). Later Mr. Taylor said that he had testified in court that Mr. Reid was not the one (Tr. 90). Mr. Taylor then identified the appellant and said that he was positive it was the appellant (Tr. 90).

Detective Clark testified that he had a conversation with the witness Taylor concerning Mr. Reid, and had shown Mr. Taylor certain photographs, one of which he identified. When asked whose photograph it was, Clark replied that it was the appellant's (Tr. 94-95). An objection to that question was overruled. However, no mention was made as to what was said or what the purpose of the identification was (Tr. 94-95). The prosecutor then asked Clark if Reid had been released as a result of a hearing that had been held and an objection to this question was made before it was answered. The court instructed the prosecutor not to press the matter and it was dropped (Tr. 99).

The defense called a witness, Mrs. Cecil Andrews, who testified that appellant was her foster child and that appellant lived with her and was home on July 20 at the time of the assault with intent to commit robbery (see footnote 1, *supra*) (Tr. 106-108). The defense then presented an attorney, George Mitchell, who represented James Reid at a preliminary hearing in the Court of General Sessions, Reid having been a suspect in this case. Mitchell testified that at the hearing, Mrs. Buckman stated positively that Reid was the one who committed the crime (Tr. 116-117). Mitchell also stated that there was a strong resemblance between Mr. Reid and the appellant (Tr. 117-118). Near the close of the defendant's case the jury was excused, and the court asked the appellant if he had carefully and sufficiently considered the matter of his taking the stand, and after talking to his attorney whether he had concluded that it would be better for him not to take the stand. The appellant replied "yes." The court then asked "You concluded that?" and the appellant again replied "yes" (Tr. 119). Defense counsel stated to the court that he could not call the appellant to the stand as a result of confidential communications between the appellant and himself. The court informed defense counsel that he would not have to disclose those confidential communications and that they would not be disclosed to the jury in any event (Tr. 121). Defense counsel requested the court to instruct the jury at the close of the case that if the defendant did not take the stand it should not be held against him. The court then took a five minute recess to give defense counsel an opportunity to discuss carefully the matter of appellant's taking the stand (Tr. 122). Upon reconvening appellant again said that he was in agreement with his attorney that he should not take the stand (Tr. 123).

During rebuttal argument the prosecuting attorney mentioned there had been no showing the defendant had been anywhere else other than where the Government witness, Taylor, said he was, and the defendant had no

alibi. He submitted to the jury that Taylor ought to be believed and that Taylor's testimony based on solid evidence convicted the appellant. He further said that the case was important not only to the appellant but also to the victims, the citizens of the community who must not be victims in the future (Tr. 150-151).

In discussing instructions to the jury, defense counsel indicated that he desired the court to instruct on a charge of simple assault as a lesser included offense on the assault with a dangerous weapon charge (Tr. 152). At the close of his case, defense counsel renewed a motion for judgment of acquittal which had been denied at the close of the Government's case on the remaining counts; it was again denied (Tr. 152). In the instructions to the jury the court informed them of the definition of an assault (Tr. 164). The court also instructed the jury that the fact appellant did not testify should not in the slightest degree be held against him (Tr. 168). The court further instructed the jury on the lesser included offense of simple assault under the assault with a dangerous weapon charge, as requested (Tr. 170). The jury retired to deliberate at 10:31 A.M. and returned a verdict that afternoon (Tr. 174). After the verdict, defense counsel moved for a judgment of acquittal notwithstanding the verdict of the jury on the simple assault charge, taking the position that it was impossible to render a verdict of simple assault and not assault with a dangerous weapon. The court denied the motion saying that the charge of simple assault submitted to the jury was exactly what defense counsel had agreed to and there had been no objections when it was given (Tr. 175).

STATUTES AND RULES INVOLVED

Title 22, D. C. Code, Section 504, provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

Title 22, D. C. Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Rule 30, Federal Rules of Criminal Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any partion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(a), Federal Rules of Criminal Procedure provides:

> *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

SUMMARY OF ARGUMENT

I

Appellant's contentions that the evidence does not support the verdict is completely without merit. The testimony of the complaining witness and another witness supply all of the necessary elements of both counts as well as their positive identifications. It was for the jury to weigh the evidence, to determine the credibility of the witnesses and to resolve any conflicts in the testimony.

The instruction to the jury on the lesser included offense of simple assault was not only proper, since there was evidence in the case to support a reasonable hypothesis of guilt, but it was also requested by defense counsel and the appellant is not now in a position to assign it as error.

II

The testimony pertaining to the photograph was limited to physical observations. Questioning was ceased before any mention was made concerning any statement by the identifier or the purpose of the identification. There was no testimony offered for the truth of any extra-judicial statement, the identifier was a witness available for cross-examination, and such testimony was not hearsay. Assuming, *arguendo*, that it was hearsay, the complaining witness and the identifier of the photograph had already made positive identifications of the defendant and such evidence was merely cumulative and not prejudicial.

III

Testimony pertaining to the former suspect in the case had first been brought out in cross-examination of other witnesses by defense counsel. The question by the prosecutor as to whether that suspect had been released was not error. Even assuming it to be error, two witnesses

had already testified that they had mistakenly identified the former suspect who strongly resembled the appellant, and such a question was certainly not prejudicial. This is particularly true in light of the fact that the line of questioning was ceased upon objection, there was no answer to the question, no motion for mistrial and no instruction requested to be given to the jury regarding the question. Appellant's other allegations of error concerning the prosecutor's remarks are frivolous.

IV

The prosecutor's comment in closing argument that there had been no showing that appellant was anywhere other than where the government witnesses placed him and that there was no alibi was not manifestly intended as, or of such character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify. Even if such words were construed to be a comment on appellant's failure to take the stand, the effect of those remarks was corrected by the trial court's final charge to the jury as requested by defense counsel.

V

Appellant was not denied effective assistance of counsel by reason of counsel's failure to have him testify. Appellant was informed of his rights by the court and appellant indicated that he had carefully considered the matter and concluded, on his own as well as relying upon counsel's advice, not to testify. He may not now complain that this tactic, because unsuccessful, constitutes ineffective assistance of counsel. At no time did appellant indicate any desire to testify. A defendant may not agree in his counsel's defense of him or his lack of it and, after conviction, obtain a new trial because of the alleged incompetence, negligence, or lack of skill of that counsel.

ARGUMENT

I. The evidence of housebreaking and simple assault was legally sufficient and the instruction on the lesser included offense of simple assault was properly given.

(See Tr. 51-60, 62-66, 71-73, 76-78, 90, 152, 164).

Appellant argues that the evidence indicates that the primary concern of the invader was a sexual relationship rather than theft of property. However, the complaining witness testified that when she awoke she first observed appellant, a stranger, searching through the drawers of her dresser (Tr. 55). He subsequently approached her and lifted up her dress making an illicit remark (Tr. 56-57). He then started opening her blouse, searched her pillow and asked for money (Tr. 57). Appellant while holding a knife in his hand twice threatened to cut her if she screamed and as he was leaving threatened to cut her if she followed him (Tr. 56-57).

A neighbor of the complainant's, Mr. Taylor, testified that he saw appellant climbing out of the window of the complainant's home at the time in question (Tr. 71-72). Mr. Taylor had seen the appellant frequently before and knew his nickname (Tr. 73). The complainant and Mr. Taylor made positive identifications of appellant at trial. (Tr. 59, 64, 72, 90.)

The evidence clearly supports the contention that appellant entered Mrs. Buckman's apartment with intent to steal property from her, and the assault on her was an afterthought. In *Washington* v. *United States*, 105 U.S. App. D. C. 58, 263 F.2d 742, *cert. denied*, 359 U.S. 1002 (1959), the housebreaker assaulted a young girl as she lay sleeping in the early hours of the morning. There was no direct evidence of theft, although the conviction was for housebreaking with intent to steal and assault. The appellant in that case argued that there was insufficient evidence to prove the intent to steal. This Court stated that in such circumstances intent need not be shown by any specific acts or

conduct, and the unexplained presence of the appellant, in the darkened house, near midnight, having entered by force and stealth through a window, was ample without more to allow an inference that he was there to steal. That he assaulted the girl after the illegal entry did not preclude the original intent to steal. There was no evidence offered in *Washington* to show that the housebreaker lacked a motive for theft. In absence of such evidence this Court said that the verdict could not be disturbed. The facts in the instant case are very similar and even considerably stronger. There is substantial evidence to indicate intent to steal. Appellant was first seen searching through the dresser drawers. He then searched through complainant's pillow and asked her for money. Appellant's argument is frivolous. See also *Cady* v. *United States*, 54 App. D.C. 10, 293 Fed. 829 (1923) where this Court said that the defendants' unexplained unlawful presence in a garage early in the morning and their departure in a waiting auto, were sufficient facts for the jury to find an intent to steal.

The principles by which the legal sufficiency of evidence in criminal cases is tested on appeal require that a judgment of conviction be sustained, if, taking the view most favorable to the Government and giving full play to the right of the jury to determine credibility and draw justifiable inferences of fact, a reasonable man might fairly conclude guilt beyond a reasonable doubt. *Glasser* v. *United States*, 315 U.S. 60 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947), *cert. denied*, 330 U.S. 837. Applying these standards it is evident that the testimony of the Government's witnesses was quite sufficient to support conviction of housebreaking with intent to steal property of another and also simple assault.

Appellant contends that the court erred in instructing the jury on the lesser included offense of simple assault claiming that the jury could only find appellant guilty of assault with a dangerous weapon or not guilty and there

was no evidence of simple assault. The testimony by the complainant involving the assault was to the effect that appellant lifted up her dress, made an illicit remark, started opening her blouse and while holding a knife in his hands twice threatened to cut her, and again threatened to cut her if she followed him (Tr. 56-57). The court instructed the jury that an assault is defined as an unlawful attempt or an effort with force and violence to do injury to the person of another coupled with the present apparent possibility of carrying out such an intent (Tr. 164).

Where there is any evidence from which a jury might reasonably conclude guilt of a lesser included offense, it is proper to instruct the jury on that offense. *Stevenson* v. *United States*, 162 U.S. 313 (1896); *Goodall* v. *United States*, 86 U.S. App. D.C. 148, 180 F.2d 397 (1950). In order to render an instruction on a lesser charge improper, there must be a complete absence of evidence to support conviction of that offense. *Kinard* v. *United States*, 68 App. D.C. 250, 96 F.2d 522 (1938). Only where the evidence precludes the possibility of guilt of a lesser included offense is it error to submit the case to the jury on that offense. *Hansborough* v. *United States*, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962); *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955).

The weight and credibility of the evidence is solely for the jury and when they are instructed on a lesser included offense they can totally believe either the defendant or complaining witness or believe either or both only partially. *Young* v. *United States*, 114 U.S. App. D.C. 42, 309 F.2d 662 (1962). In the instant case the jury could well have believed the complainant's testimony about appellant lifting up her dress and opening her blouse and threatening her while disbelieving the testimony that appellant had a knife. There were no injuries and no weapon was introduced at trial.

Defense counsel requested that the jury be instructed as to simple assault and made no objection when the in-

struction was given (Tr. 152). Appellant is not now in a position to assign that instruction as error. Rule 30, Fed. R. Crim. P. In view of the evidence and request for the instruction it appears that it would probably have been reversible error if the court had not given the instruction on the lesser included offense. *Hansborough* v. *United States, supra.*

II. The testimony pertaining to the appellant's photograph was not hearsay evidence, and assuming *arguendo* that it was hearsay it was not error prejudicial to appellant.

(See Tr. 59, 64, 72, 82-83, 90, 94-95.)

The testimony involved on this issue was the response of a detective, who was a witness for the Government, to questions by the prosecutor. The detective was asked if he had conversation with another witness, Mr. Taylor, concerning the charging of a Mr. Reid in this case. The detective replied yes. The detective was then asked if he had shown Taylor certain photographs to which the detective replied yes. He was then asked if Taylor identified any of those photographs, and again he replied yes. Then the prosecutor asked whose photograph Taylor identified, and the detective replied that it was the appellant's (Tr. 94-95).

It has been held permissible to show by a third person that he was present at the scene of an identification and the manner in which it was made, but testimony as to what was said by the identifier in respect to the identification has been held inadmissible. *Commonwealth* v. *Rollins*, 242 Mass. 427, 136 N.E. 360 (1922). There was no testimony in the present case as to what the identifier said. The identification by another witness as testified to by an officer was a fact that he witnessed personally and his testimony was not merely corroborative but rather primary evidence. *Commonwealth* v. *Locke*, 335 Mass. 106, 138 N.E. 2d 359 (1956).

Such testimony has also been allowed in rebuttal of testimony tending to impeach or discredit the identifier, or in explanation of a seeming inconsistency brought out on cross-examination of the identifier. *State* v. *Neiman*, 123 N.J.L. 341, 8 A.2d 713 (1939). The defense counsel in the instant case had already elicited testimony from the identifier on cross-examination to the effect that the identifier admitted that he had made a prior mistaken identification of a man other than the appellant (Tr. 82-83).

The fact that the identifier was a witness at trial has also been held as a basis to admit such testimony. *Di Carlo* v. *United States*, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). The court in the *Di Carlo* case, in commenting upon allowing a third party to testify to an identification which he witnessed (where the identifier was also a witness at trial), said that the common sense of allowing such testimony has been too strong for the formal objection that the evidence is hearsay, and the objection is in substance not good anyway, since the identifier is present and can be cross-examined. The identifier was available for cross-examination in the present case, and did in fact testify.

The traditional reluctance on the part of many courts to admit testimony that appears to corroborate a prior identification by a witness through a witness who heard or viewed the prior identification has yielded to reason. *Rich* v. *United States*, 261 F.2d 536 (4th Cir. 1958), *cert. denied*, 359 U.S. 946; *Solf* v. *State*, 227 Md. 192, 175 A.2d 591 (1961); *People* v. *Gould*, 54 Cal.2d 621, 354 P.2d 865 (1960); *Mack* v. *United States*, D. C. Mun. App., 150 A.2d 477 (1959); *Basoff* v. *State*, 119 A.2d 917 (Md. 1956); Annot., 71 A.L.R.2d 449 (1960).

Assuming, *arguendo*, that the testimony pertaining to the photograph was hearsay, it was not error prejudicial to appellant. In *Baber* v. *United States*, —— U.S. App. D.C. ——, 324 F.2d 390 (1963), two police officers testified as to what the complainant told them about the crime

including defendant's identity. This Court stated at p. 393:

> The hearsay rule is primarily designed to exclude testimony of extra-judicial declarations when those declarations are introduced for the purpose of proving the truth of their content. In this case however the testimony of the police officers was merely cumulative for that purpose, since the story had already been related by the complaining witness and her father. The complaining witness was seen and heard and cross-examined as to her story. No error of substantial rights occurred as a result of admission of the police officer's testimony.

Similarly, in this case the complaining witness and another witness (identifier of the photo) had already testified and made positive identification of the appellant (Tr. 59, 64, 72, 90). In a very recent case, *Leeper* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (No. 18034, decided January 9, 1964), a police officer described an identification of another witness in detail saying that the witness had pointed out a person as being the one who committed the crime. "A person, not the witness, has made an out-of court statement which was offered in evidence by the witness for the truth of the assertion which it contained." Comment, *Extra-Judicial Identification*, 19 Md. L. Rev. 201, 211-219 (1959), quoted in *Leeper* v. *United States*, *supra*, slip opinion at 2, (concurring opinion). Notwithstanding the identification testimony in *Leeper*, this Court unanimously affirmed, finding that there was no error affecting substantial rights of the accused. The testimony in the present case was much more limited and did not involve a statement such as occurred in *Leeper*.

In light of *Baber*, *supra*, and *Leeper*, *supra*, it is evident from the facts of this case that the testimony pertaining to the appellant's photograph was cumulative and there was no error affecting substantial rights of the appellant.

III. The prosecutor's question regarding a former suspect in the case who had been released and comments by the prosecutor in his closing argument were not prejudicial to appellant.

(Tr. 62, 82, 83, 99)

The prosecutor asked a Government witness whether a former suspect in the case had been released as a result of a hearing in another court. The question was objected to, the court directed the prosecutor not to press it, and the matter was dropped. The question was not answered, no motion for a mistrial was made, and there was no request to instruct the jury regarding the question. (Tr. 99).

Testimony regarding the former suspect was first elicited by defense counsel in cross-examination of another Government witness (Tr. 62). Appellant now argues that the asking of a question regarding that suspect was prejudicial error; however, he cites no authority for that proposition. The record indicates that appellant was satisfied with the ruling and withdrawing of the question at trial for no further motions or requests were made in reference to the question. Appellant contends that the court should have *sua sponte* declared a mistrial. Whether or not to declare a mistrial is within the discretion of the trial judge. *McIntosh* v. *United States*, 114 U.S. App. D.C. 1, 309 F.2d 222 (1962), *cert. denied*, 373 U.S. 944 (1963).

Appellant further contends that the court should have at least instructed the jury to disregard the question, even though no such request was made. An omitted instruction for which there had been no request could never warrant reversal unless it concerned a crucial issue either of law or fact of a sort with which the jury cannot properly deal without a special instruction of the court. *Willis* v. *United States*, 106 U.S. App. D.C. 211, 271 F.2d 477 (1959), *cert. denied*, 362 U.S. 964 (1960).

The evidence reveals nothing to support the claim that the court abused its discretion, or that the comment re-

quired a special instruction to the jury. Two Government witnesses had already testified that they had mistakenly identified the former suspect, before the question in issue was ever asked (Tr. 62, 82, 83). Any error was certainly harmless. Rule 52(a), F.R. Crim. P.

No objections were made during the prosecutor's remarks in closing argument which were to the effect that one of the Government witnesses should be believed and the outcome of the case was important to the victims, citizens who should not be victims in the future. The prosecutor's remarks were proper and appellant's allegations are frivolous. If every remark made by counsel outside of the testimony was ground for reversal, comparatively few verdicts would stand. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

IV. The prosecutor in his closing argument did not refer to appellant's failure to testify, and even if his remarks were so construed any error was cured by the court's final charge to the jury.

(See Tr. 106-108, 150-151, 168.)

Appellant contends that the prosecutor's remarks in his closing argument that there had been no showing the appellant was anywhere other than where a government witness said he was, and no alibi to put him anywhere else, were references to appellant's failure to testify (Tr. 150-151).

The right of a defendant is a precious one and deserves a careful protection, and the exercise of that right shall not create any presumption against him, 18 U.S.C. § 3481. This does not mean, however, that the privilege against self-incrimination is violated by every statement which may be construed, however implausibly, as a comment on his failure to take the stand.

Where the issue is whether certain language invaded the privilege the test to be applied is whether that lan-

guage was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of accused to testify. *United States* v. *Wright*, 309 F.2d 735, 738 (7th Cir.), *cert. denied*, 372 U.S. 929 (1962); *Knowles* v. *United States*, 224 F.2d 168, 170 (10th Cir. 1955); *Morrison* v. *United States*, 6 F.2d 809, 811 (8th Cir. 1925); *Robilio* v. *United States*, 291 Fed. 975, 985 (6th Cir. 1923). Were the remarks in the instant case manifestly intended or did they have a natural and necessary tendency to call attention to appellant's failure to testify? The following remarks by the prosecutor in closing argument were held not to be a reference to the defendant's failure to testify: "We don't know what goes on inside their (defendants) minds; we can't climb inside and see." *Fogarty* v. *United States*, 263 F.2d 201, 204 (5th Cir. 1959). In *Knowles* v. *United States*, *supra*, the prosecutor remarked that the defendant had every opportunity to make an explanation of his unreported income to prove it was error and to cast doubt upon it but it wasn't done, and it was so easy to do if it was the truth. The court did not find that remark to be a reference to the defendant's failure to testify. In another case the prosecutor's comment that only two people in the courtroom knew whether a certain meeting had taken place, and they were the defendants was held not to be a reference to the defendants' failure to testify. *United States* v. *De Vasto*, 52 F.2d 26, 30 (2d Cir.), *cert. denied*, 284 U.S. 678 (1931).

In *Morgan* v. *United States*, 31 F.2d 385, 388 (7th Cir. 1929) the prosecutor remarked to the jury: "What does he (defense counsel) want me to do? Does he want me to call Hust and Morgan (both defendants) to the stand before you gentlemen and have them tell you what? No the criminal laws don't permit it." That was held not to be a reference to the defendant's failure to take the stand.

As the court stated in *Langford* v. *United States*, 178 F.2d 48, 55 (9th Cir.), *cert. denied*, 339 U.S. 938 (1949):

> "Except in those special cases where it appears that the accused himself is the only one who could possibly contradict the government's testimony . . . the prosecutor may properly call attention to the fact that the testimony of the government witness has not been contradicted."

The language in the present case was a general comment on the fact that a particular government witness' testimony was uncontradicted, and the defendant was not the only one who could have contradicted it. In this case the defense presented a witness, Mrs. Andrews, who testified that appellant was her foster child and lived with her. Her testimony was offered as an alibi to the assault with intent to commit robbery charge which allegedly occurred in the early morning hours of July 20. (Tr. 106-108). Indeed it was the offering of a witness who was appellant's guardian and with whom appellant lived whose testimony supplied an alibi for the early morning hours of one day but not the next day that prompted the prosecutor's remarks about no alibi for the crimes now being considered. Cf. *Peden* v. *United States*, 96 U.S. App. D.C. 27, 223 F.2d 319 (1955).

In any event one of the court's instructions was sufficient to correct any misinterpretation that may have resulted from the comments of government counsel. The court instructed the jury that the fact the appellant did not testify should not in the slightest degree be held against him (Tr. 168). This brings to mind what Judge Augustus Hand said in *United States* v. *Di Carlo*, 64 F.2d 15, 18 (2d Cir. 1933):

> "We should be blind to realities if we supposed that juries are unconscious of the omission of a defendant to take the stand, and we think the express instruction to the jury, in this case, that this fact must not prejudice the defendant, did all that could ever be done to prevent the consideration by them of the omission in arriving at their verdict."

Although defense counsel requested the court to give the instruction to the jury concerning appellant's right not to testify, there was no request for an instruction to disregard the prosecutor's remarks here complained of. It may well have been that defense counsel did not wish to have any such instruction as a matter of trial tactics, and had the court *sua sponte* given such an instruction it would have been usurping such tactics.

V. Appellant was not denied effective assistance of counsel.

(See Tr. 119-123)

Appellant was not denied effective assistance of counsel because of his counsel's failure to have him testify. The decision was a tactical one, and agreed to by the appellant. In fact, the Court discussed this matter with the appellant on two different occasions and informed him of his right to testify or not to testify, and each time the appellant indicated that he did not want to testify (Tr. 119, 123). Such a decision may not be attacked initially, after conviction, as unwise or improvident. *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958). In *Mitchell* this Court said:

> [E]ffective assistance . . . does not relate to decisions he (the lawyer) makes in the normal course of a criminal case. 104 U.S. App. D.C. at 63, 259 F.2d at 793.

And see *Hensley* v. *United States*, 108 U.S. App. D.C. 242, 281 F.2d 605 (1960); *Frand* v. *United States*, 301 F.2d 102 (10th Cir. 1962); *O'Malley* v. *United States*, 285 F.2d 733 (6th Cir. 1961); *United States* v. *Handy*, 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953); *Casey* v. *Overlade*, 129 F.Supp. 433 (N.D. Ind. 1955).

The Court in *United States* v. *Handy, supra*, at 427, stated in response to the suggestion that trial counsel erred, *inter alia*, in not calling the defendant to the stand:

> These were all questions of the type which trial counsel in criminal cases are continually called upon to meet and which they must decide under the pressure of the trial and in the light of their best judgment at the time.

The appellant at all times indicated that he did not want to testify and did not even suggest that he had considered testifying. Counsel stated to the court that he could not allow the appellant to testify as a result of a confidential communication; however, he at no time indicated that appellant had ever expressed a desire to testify. Counsel was also informed by the court that he would not have to disclose any confidential communications (Tr. 121). Appellant's failure to voice an objection to the trial tactics of his counsel is fatal to his claim of error on appeal. *Hensley* v. *United States, supra.* In *Hensley*, this Court approved the following language of the Third Circuit in *United States* v. *Handy, supra*:

> A defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel. 108 U.S. App. D.C. at 246, 281 F.2d at 609.

Even if it is assumed that appellant was coerced not to testify and it is further assumed that counsel's action was erroneous, no error appears which warrants reversal. For a defense counsel is not to be deemed incompetent or to have rendered ineffective assistance, simply because he committed one error of judgment. Rather, only if his representation of his client is such that it shocks the conscience of the court and makes the proceedings a farce and mockery of justice will a new trial be ordered. *Mitchell* v. *United States, supra; Edwards* v. *United*

States, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958); *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 148 F.2d 667, *cert. denied*, 325 U.S. 889 (1945).

The situation in this case is similar to the problem presented in *Hester* v. *United States*, 303 F.2d 47 (10th Cir.), *cert. denied*, 371 U.S. 847 (1962), where the court stated at 49:

> In the case at bar the prosecution presented a careful and complete case to which appellant apparently had no answer. Neither vigor nor skill can overcome truth. Success is not the test of effective assistance of counsel.

This same issue was presented to this Court in *Kearney* v. *United States*, No. 17837, *affirmed* by order dated October 9, 1963, *cert. denied*, 376 U.S. 918 (1964). The instant case is even stronger for the Government because in *Kearney* the appellant indicated that he wished to testify at one stage of the trial and later decided not to testify relying upon his counsel's advice.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
DANIEL A. REZNECK,
GERALD E. GILBERT,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1964 729618 915

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,402

CHARLES D. CANNON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
DANIEL A. REZNECK,
GERALD E. GILBERT,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the evidence was sufficient to support a conviction for housebreaking and simple assault as a lesser included offense of assault with a dangerous weapon where: (a) the complaining witness's testimony provided all of the necessary elements directly implicating the defendant in both offenses; (b) appellant was seen climbing out of a window of the complainant's home by a neighbor who had seen the appellant on frequent prior occasions; and (c) defense counsel agreed to have the court submit the lesser included offense to the jury?

2) Whether the trial court erred in allowing a police officer to testify that a photograph which a previous witness had identified was appellant's photograph, where no other mention was made at trial of this identification?

3) Whether there was prejudicial error when the prosecutor: (a) questioned a government witness in reference to a former suspect in the case who had been released, and the question was objected to and withdrawn without a motion for a mistrial; and (b) commented in his closing argument that a government witness should be believed, and that the outcome of the case was important to the people who were victimized by the crimes?

4) Whether the prosecutor's comment, in his closing argument, that there had been no showing that appellant was anywhere other than where the government's witnesses had placed him, constituted comment on appellant's failure to take the witness stand?

5) Whether appellant was denied effective assistance of counsel by counsel's failure to call him to the stand, when appellant himself told the court that after consulting with counsel he had decided on his own not to testify?

INDEX

TABLE OF CASES

Cases—Continued

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,402

CHARLES D. CANNON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 24, 1963, appellant was indicted for assault with intent to commit robbery (22 D.C.C. 501), assault with a dangerous weapon (22 D.C.C. 502), two counts of housebreaking (22 D.C.C. 1801), and petit larceny (22 D.C.C. 2202). Trial by jury began on November 12, 1963. A verdict of guilty on one count of housebreaking and a lesser included offense of simple assault was returned by the jury on November 13, 1963.[1]

[1] A motion for judgment of acquittal was granted by the court at the close of the Government's case on one housebreaking count and

On December 16, 1963, the appellant was placed in custody of the Attorney General as a youth offender pursuant to Title 18 U.S.C. § 5010(b).

The Government introduced the following evidence to support the housebreaking and simple assault verdict:

Mrs. Winona G. Buckman testified that sometime between 3:30 and 4:00 A.M. on July 21, as she lay sleeping in her second floor bedroom apartment with her four children, ages 3, 4, 6, and 9, she was awakened by a noise (Tr. 51-55). When she opened her eyes she saw the appellant opening and looking over the top of the drawers of a dresser which was only a few inches from her bed (Tr. 55). She asked him what he was doing there and he approached her bed and stood over her with a knife in his hand. He pulled her dress up and made an illicit remark and she told him to leave upon which he threatened to cut her if she hollered (Tr. 56-57). He started opening her blouse, was again told to leave and again threatened to cut her if she hollered. He searched the pillow she was lying on and asked her if she had any money, to which she replied no. He inquired as to the age of the 9 year old girl, and then proceeded to leave the room threatening to cut Mrs. Buckman if she followed him (Tr. 57).

The bedroom door was open into the hallway and a light was on in the hallway enabling Mrs. Buckman to see the appellant and she identified the appellant as the man who had done this (Tr. 58-59). After appellant left, Mrs. Buckman locked her door, went downstairs, awakened her husband, and called the police at about 3:55 A.M. (Tr. 59-60). Mrs. Buckman stated that she had previously identified a James Reid as the man who had done

---

the petit larceny charge, both of which had allegedly occurred on July 21, 1963. The jury returned a verdict of not guilty on the charge of assualt with intent to commit robbery which allegedly had occurred on July 20, 1963, a separate date and circumstance from the other offenses.

this but was not positive about that identification. She said James Reid and the appellant looked alike but when she later saw the appellant she knew from his appearance and actions that it was he who had been in her apartment that morning (Tr. 62-66). Robert Taylor, a next door neighbor of Mrs. Buckman, testified that he lay down about 3:00 or 3:30 A.M. and twenty to twenty-five minutes later he heard a noise coming from next door. When he looked out he saw the appellant coming out of the window of Mrs. Buckman's home. The appellant was about two to three feet away from Mr. Taylor (Tr. 71-72). Mr. Taylor had seen the appellant frequently in the neighborhood and knew his nickname (Tr. 73). When Mr. Taylor saw appellant climbing out the window, appellant was facing out with his back to the inside of the house (Tr. 76-77). There were lights on inside the house appellant was coming from (Tr. 78). Mr. Taylor testified that he had previously identified a James Reid as being the man he saw coming from the house; however, he had not seen him long before the first identification, and Mr. Reid and appellant looked alike (Tr. 82-84). Later Mr. Taylor said that he had testified in court that Mr. Reid was not the one (Tr. 90). Mr. Taylor then identified the appellant and said that he was positive it was the appellant (Tr. 90).

Detective Clark testified that he had a conversation with the witness Taylor concerning Mr. Reid, and had shown Mr. Taylor certain photographs, one of which he identified. When asked whose photograph it was, Clark replied that it was the appellant's (Tr. 94-95). An objection to that question was overruled. However, no mention was made as to what was said or what the purpose of the identification was (Tr. 94-95). The prosecutor then asked Clark if Reid had been released as a result of a hearing that had been held and an objection to this question was made before it was answered. The court instructed the prosecutor not to press the matter and it was dropped (Tr. 99).

The defense called a witness, Mrs. Cecil Andrews, who testified that appellant was her foster child and that appellant lived with her and was home on July 20 at the time of the assault with intent to commit robbery (see footnote 1, *supra*) (Tr. 106-108). The defense then presented an attorney, George Mitchell, who represented James Reid at a preliminary hearing in the Court of General Sessions, Reid having been a suspect in this case. Mitchell testified that at the hearing, Mrs. Buckman stated positively that Reid was the one who committed the crime (Tr. 116-117). Mitchell also stated that there was a strong resemblance between Mr. Reid and the appellant (Tr. 117-118). Near the close of the defendant's case the jury was excused, and the court asked the appellant if he had carefully and sufficiently considered the matter of his taking the stand, and after talking to his attorney whether he had concluded that it would be better for him not to take the stand. The appellant replied "yes." The court then asked "You concluded that?" and the appellant again replied "yes" (Tr. 119). Defense counsel stated to the court that he could not call the appellant to the stand as a result of confidential communications between the appellant and himself. The court informed defense counsel that he would not have to disclose those confidential communications and that they would not be disclosed to the jury in any event (Tr. 121). Defense counsel requested the court to instruct the jury at the close of the case that if the defendant did not take the stand it should not be held against him. The court then took a five minute recess to give defense counsel an opportunity to discuss carefully the matter of appellant's taking the stand (Tr. 122). Upon reconvening appellant again said that he was in agreement with his attorney that he should not take the stand (Tr. 123).

During rebuttal argument the prosecuting attorney mentioned there had been no showing the defendant had been anywhere else other than where the Government witness, Taylor, said he was, and the defendant had no

alibi. He submitted to the jury that Taylor ought to be believed and that Taylor's testimony based on solid evidence convicted the appellant. He further said that the case was important not only to the appellant but also to the victims, the citizens of the community who must not be victims in the future (Tr. 150-151).

In discussing instructions to the jury, defense counsel indicated that he desired the court to instruct on a charge of simple assault as a lesser included offense on the assault with a dangerous weapon charge (Tr. 152). At the close of his case, defense counsel renewed a motion for judgment of acquittal which had been denied at the close of the Government's case on the remaining counts; it was again denied (Tr. 152). In the instructions to the jury the court informed them of the definition of an assault (Tr. 164). The court also instructed the jury that the fact appellant did not testify should not in the slightest degree be held against him (Tr. 168). The court further instructed the jury on the lesser included offense of simple assault under the assault with a dangerous weapon charge, as requested (Tr. 170). The jury retired to deliberate at 10:31 A.M. and returned a verdict that afternoon (Tr. 174). After the verdict, defense counsel moved for a judgment of acquittal notwithstanding the verdict of the jury on the simple assault charge, taking the position that it was impossible to render a verdict of simple assault and not assault with a dangerous weapon. The court denied the motion saying that the charge of simple assault submitted to the jury was exactly what defense counsel had agreed to and there had been no objections when it was given (Tr. 175).

STATUTES AND RULES INVOLVED

Title 22, D. C. Code, Section 504, provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

Title 22, D. C. Code, Section 1801, provides:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Rule 30, Federal Rules of Criminal Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any partion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(a), Federal Rules of Criminal Procedure provides:

> *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

SUMMARY OF ARGUMENT

I

Appellant's contentions that the evidence does not support the verdict is completely without merit. The testimony of the complaining witness and another witness supply all of the necessary elements of both counts as well as their positive identifications. It was for the jury to weigh the evidence, to determine the credibility of the witnesses and to resolve any conflicts in the testimony.

The instruction to the jury on the lesser included offense of simple assault was not only proper, since there was evidence in the case to support a reasonable hypothesis of guilt, but it was also requested by defense counsel and the appellant is not now in a position to assign it as error.

II

The testimony pertaining to the photograph was limited to physical observations. Questioning was ceased before any mention was made concerning any statement by the identifier or the purpose of the identification. There was no testimony offered for the truth of any extrajudicial statement, the identifier was a witness available for cross-examination, and such testimony was not hearsay. Assuming, *arguendo*, that it was hearsay, the complaining witness and the identifier of the photograph had already made positive identifications of the defendant and such evidence was merely cumulative and not prejudicial.

III

Testimony pertaining to the former suspect in the case had first been brought out in cross-examination of other witnesses by defense counsel. The question by the prosecutor as to whether that suspect had been released was not error. Even assuming it to be error, two witnesses

had already testified that they had mistakenly identified the former suspect who strongly resembled the appellant, and such a question was certainly not prejudicial. This is particularly true in light of the fact that the line of questioning was ceased upon objection, there was no answer to the question, no motion for mistrial and no instruction requested to be given to the jury regarding the question. Appellant's other allegations of error concerning the prosecutor's remarks are frivolous.

IV

The prosecutor's comment in closing argument that there had been no showing that appellant was anywhere other than where the government witnesses placed him and that there was no alibi was not manifestly intended as, or of such character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify. Even if such words were construed to be a comment on appellant's failure to take the stand, the effect of those remarks was corrected by the trial court's final charge to the jury as requested by defense counsel.

V

Appellant was not denied effective assistance of counsel by reason of counsel's failure to have him testify. Appellant was informed of his rights by the court and appellant indicated that he had carefully considered the matter and concluded, on his own as well as relying upon counsel's advice, not to testify. He may not now complain that this tactic, because unsuccessful, constitutes ineffective assistance of counsel. At no time did appellant indicate any desire to testify. A defendant may not agree in his counsel's defense of him or his lack of it and, after conviction, obtain a new trial because of the alleged incompetence, negligence, or lack of skill of that counsel.

ARGUMENT

I. The evidence of housebreaking and simple assault was legally sufficient and the instruction on the lesser included offense of simple assault was properly given.

(See Tr. 51-60, 62-66, 71-73, 76-78, 90, 152, 164).

Appellant argues that the evidence indicates that the primary concern of the invader was a sexual relationship rather than theft of property. However, the complaining witness testified that when she awoke she first observed appellant, a stranger, searching through the drawers of her dresser (Tr. 55). He subsequently approached her and lifted up her dress making an illicit remark (Tr. 56-57). He then started opening her blouse, searched her pillow and asked for money (Tr. 57). Appellant while holding a knife in his hand twice threatened to cut her if she screamed and as he was leaving threatened to cut her if she followed him (Tr. 56-57).

A neighbor of the complainant's, Mr. Taylor, testified that he saw appellant climbing out of the window of the complainant's home at the time in question (Tr. 71-72). Mr. Taylor had seen the appellant frequently before and knew his nickname (Tr. 73). The complainant and Mr. Taylor made positive identifications of appellant at trial. (Tr. 59, 64, 72, 90.)

The evidence clearly supports the contention that appellant entered Mrs. Buckman's apartment with intent to steal property from her, and the assault on her was an afterthought. In *Washington* v. *United States*, 105 U.S. App. D. C. 58, 263 F.2d 742, *cert. denied*, 359 U.S. 1002 (1959), the housebreaker assaulted a young girl as she lay sleeping in the early hours of the morning. There was no direct evidence of theft, although the conviction was for housebreaking with intent to steal and assault. The appellant in that case argued that there was insufficient evidence to prove the intent to steal. This Court stated that in such circumstances intent need not be shown by any specific acts or

conduct, and the unexplained presence of the appellant, in the darkened house, near midnight, having entered by force and stealth through a window, was ample without more to allow an inference that he was there to steal. That he assaulted the girl after the illegal entry did not preclude the original intent to steal. There was no evidence offered in *Washington* to show that the housebreaker lacked a motive for theft. In absence of such evidence this Court said that the verdict could not be disturbed. The facts in the instant case are very similar and even considerably stronger. There is substantial evidence to indicate intent to steal. Appellant was first seen searching through the dresser drawers. He then searched through complainant's pillow and asked her for money. Appellant's argument is frivolous. See also *Cady* v. *United States*, 54 App. D.C. 10, 293 Fed. 829 (1923) where this Court said that the defendants' unexplained unlawful presence in a garage early in the morning and their departure in a waiting auto, were sufficient facts for the jury to find an intent to steal.

The principles by which the legal sufficiency of evidence in criminal cases is tested on appeal require that a judgment of conviction be sustained, if, taking the view most favorable to the Government and giving full play to the right of the jury to determine credibility and draw justifiable inferences of fact, a reasonable man might fairly conclude guilt beyond a reasonable doubt. *Glasser* v. *United States*, 315 U.S. 60 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947), *cert. denied*, 330 U.S. 837. Applying these standards it is evident that the testimony of the Government's witnesses was quite sufficient to support conviction of housebreaking with intent to steal property of another and also simple assault.

Appellant contends that the court erred in instructing the jury on the lesser included offense of simple assault claiming that the jury could only find appellant guilty of assault with a dangerous weapon or not guilty and there

was no evidence of simple assault. The testimony by the complainant involving the assault was to the effect that appellant lifted up her dress, made an illicit remark, started opening her blouse and while holding a knife in his hands twice threatened to cut her, and again threatened to cut her if she followed him (Tr. 56-57). The court instructed the jury that an assault is defined as an unlawful attempt or an effort with force and violence to do injury to the person of another coupled with the present apparent possibility of carrying out such an intent (Tr. 164).

Where there is any evidence from which a jury might reasonably conclude guilt of a lesser included offense, it is proper to instruct the jury on that offense. *Stevenson* v. *United States*, 162 U.S. 313 (1896); *Goodall* v. *United States*, 86 U.S. App. D.C. 148, 180 F.2d 397 (1950). In order to render an instruction on a lesser charge improper, there must be a complete absence of evidence to support conviction of that offense. *Kinard* v. *United States*, 68 App. D.C. 250, 96 F.2d 522 (1938). Only where the evidence precludes the possibility of guilt of a lesser included offense is it error to submit the case to the jury on that offense. *Hansborough* v. *United States*, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962); *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955).

The weight and credibility of the evidence is solely for the jury and when they are instructed on a lesser included offense they can totally believe either the defendant or complaining witness or believe either or both only partially. *Young* v. *United States*, 114 U.S. App. D.C. 42, 309 F.2d 662 (1962). In the instant case the jury could well have believed the complainant's testimony about appellant lifting up her dress and opening her blouse and threatening her while disbelieving the testimony that appellant had a knife. There were no injuries and no weapon was introduced at trial.

Defense counsel requested that the jury be instructed as to simple assault and made no objection when the in-

struction was given (Tr. 152). Appellant is not now in a position to assign that instruction as error. Rule 30, Fed. R. Crim. P. In view of the evidence and request for the instruction it appears that it would probably have been reversible error if the court had not given the instruction on the lesser included offense. *Hansborough* v. *United States, supra.*

II. The testimony pertaining to the appellant's photograph was not hearsay evidence, and assuming *arguendo* that it was hearsay it was not error prejudicial to appellant.

(See Tr. 59, 64, 72, 82-83, 90, 94-95.)

The testimony involved on this issue was the response of a detective, who was a witness for the Government, to questions by the prosecutor. The detective was asked if he had conversation with another witness, Mr. Taylor, concerning the charging of a Mr. Reid in this case. The detective replied yes. The detective was then asked if he had shown Taylor certain photographs to which the detective replied yes. He was then asked if Taylor identified any of those photographs, and again he replied yes. Then the prosecutor asked whose photograph Taylor identified, and the detective replied that it was the appellant's (Tr. 94-95).

It has been held permissible to show by a third person that he was present at the scene of an identification and the manner in which it was made, but testimony as to what was said by the identifier in respect to the identification has been held inadmissible. *Commonwealth* v. *Rollins*, 242 Mass. 427, 136 N.E. 360 (1922). There was no testimony in the present case as to what the identifier said. The identification by another witness as testified to by an officer was a fact that he witnessed personally and his testimony was not merely corroborative but rather primary evidence. *Commonwealth* v. *Locke*, 335 Mass. 106, 138 N.E. 2d 359 (1956).

Such testimony has also been allowed in rebuttal of testimony tending to impeach or discredit the identifier, or in explanation of a seeming inconsistency brought out on cross-examination of the identifier. *State* v. *Neiman*, 123 N.J.L. 341, 8 A.2d 713 (1939). The defense counsel in the instant case had already elicited testimony from the identifier on cross-examination to the effect that the identifier admitted that he had made a prior mistaken identification of a man other than the appellant (Tr. 82-83).

The fact that the identifier was a witness at trial has also been held as a basis to admit such testimony. *Di Carlo* v. *United States*, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). The court in the *Di Carlo* case, in commenting upon allowing a third party to testify to an identification which he witnessed (where the identifier was also a witness at trial), said that the common sense of allowing such testimony has been too strong for the formal objection that the evidence is hearsay, and the objection is in substance not good anyway, since the identifier is present and can be cross-examined. The identifier was available for cross-examination in the present case, and did in fact testify.

The traditional reluctance on the part of many courts to admit testimony that appears to corroborate a prior identification by a witness through a witness who heard or viewed the prior identification has yielded to reason. *Rich* v. *United States*, 261 F.2d 536 (4th Cir. 1958), *cert. denied*, 359 U.S. 946; *Solf* v. *State*, 227 Md. 192, 175 A.2d 591 (1961); *People* v. *Gould*, 54 Cal.2d 621, 354 P.2d 865 (1960); *Mack* v. *United States*, D. C. Mun. App., 150 A.2d 477 (1959); *Basoff* v. *State*, 119 A.2d 917 (Md. 1956); Annot., 71 A.L.R.2d 449 (1960).

Assuming, *arguendo*, that the testimony pertaining to the photograph was hearsay, it was not error prejudicial to appellant. In *Baber* v. *United States*, —— U.S. App. D.C. ——, 324 F.2d 390 (1963), two police officers testified as to what the complainant told them about the crime

including defendant's identity. This Court stated at p. 393:

> The hearsay rule is primarily designed to exclude testimony of extra-judicial declarations when those declarations are introduced for the purpose of proving the truth of their content. In this case however the testimony of the police officers was merely cumulative for that purpose, since the story had already been related by the complaining witness and her father. The complaining witness was seen and heard and cross-examined as to her story. No error of substantial rights occurred as a result of admission of the police officer's testimony.

Similarly, in this case the complaining witness and another witness (identifier of the photo) had already testified and made positive identification of the appellant (Tr. 59, 64, 72, 90). In a very recent case, *Leeper* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (No. 18034, decided January 9, 1964), a police officer described an identification of another witness in detail saying that the witness had pointed out a person as being the one who committed the crime. "A person, not the witness, has made an out-of court statement which was offered in evidence by the witness for the truth of the assertion which it contained." Comment, *Extra-Judicial Identification*, 19 Md. L. Rev. 201, 211-219 (1959), quoted in *Leeper* v. *United States*, *supra*, slip opinion at 2, (concurring opinion). Notwithstanding the identification testimony in *Leeper*, this Court unanimously affirmed, finding that there was no error affecting substantial rights of the accused. The testimony in the present case was much more limited and did not involve a statement such as occurred in *Leeper*.

In light of *Baber*, *supra*, and *Leeper*, *supra*, it is evident from the facts of this case that the testimony pertaining to the appellant's photograph was cumulative and there was no error affecting substantial rights of the appellant.

III. The prosecutor's question regarding a former suspect in the case who had been released and comments by the prosecutor in his closing argument were not prejudicial to appellant.

(Tr. 62, 82, 83, 99)

The prosecutor asked a Government witness whether a former suspect in the case had been released as a result of a hearing in another court. The question was objected to, the court directed the prosecutor not to press it, and the matter was dropped. The question was not answered, no motion for a mistrial was made, and there was no request to instruct the jury regarding the question. (Tr. 99).

Testimony regarding the former suspect was first elicited by defense counsel in cross-examination of another Government witness (Tr. 62). Appellant now argues that the asking of a question regarding that suspect was prejudicial error; however, he cites no authority for that proposition. The record indicates that appellant was satisfied with the ruling and withdrawing of the question at trial for no further motions or requests were made in reference to the question. Appellant contends that the court should have *sua sponte* declared a mistrial. Whether or not to declare a mistrial is within the discretion of the trial judge. *McIntosh* v. *United States*, 114 U.S. App. D.C. 1, 309 F.2d 222 (1962), *cert. denied*, 373 U.S. 944 (1963).

Appellant further contends that the court should have at least instructed the jury to disregard the question, even though no such request was made. An omitted instruction for which there had been no request could never warrant reversal unless it concerned a crucial issue either of law or fact of a sort with which the jury cannot properly deal without a special instruction of the court. *Willis* v. *United States*, 106 U.S. App. D.C. 211, 271 F.2d 477 (1959), *cert. denied*, 362 U.S. 964 (1960).

The evidence reveals nothing to support the claim that the court abused its discretion, or that the comment re-

quired a special instruction to the jury. Two Government witnesses had already testified that they had mistakenly identified the former suspect, before the question in issue was ever asked (Tr. 62, 82, 83). Any error was certainly harmless. Rule 52(a), F.R. Crim. P.

No objections were made during the prosecutor's remarks in closing argument which were to the effect that one of the Government witnesses should be believed and the outcome of the case was important to the victims, citizens who should not be victims in the future. The prosecutor's remarks were proper and appellant's allegations are frivolous. If every remark made by counsel outside of the testimony was ground for reversal, comparatively few verdicts would stand. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

IV. The prosecutor in his closing argument did not refer to appellant's failure to testify, and even if his remarks were so construed any error was cured by the court's final charge to the jury.

(See Tr. 106-108, 150-151, 168.)

Appellant contends that the prosecutor's remarks in his closing argument that there had been no showing the appellant was anywhere other than where a government witness said he was, and no alibi to put him anywhere else, were references to appellant's failure to testify (Tr. 150-151).

The right of a defendant is a precious one and deserves a careful protection, and the exercise of that right shall not create any presumption against him, 18 U.S.C. § 3481. This does not mean, however, that the privilege against self-incrimination is violated by every statement which may be construed, however implausibly, as a comment on his failure to take the stand.

Where the issue is whether certain language invaded the privilege the test to be applied is whether that lan-

guage was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of accused to testify. *United States* v. *Wright*, 309 F.2d 735, 738 (7th Cir.), *cert. denied*, 372 U.S. 929 (1962); *Knowles* v. *United States*, 224 F.2d 168, 170 (10th Cir. 1955); *Morrison* v. *United States*, 6 F.2d 809, 811 (8th Cir. 1925); *Robilio* v. *United States*, 291 Fed. 975, 985 (6th Cir. 1923). Were the remarks in the instant case manifestly intended or did they have a natural and necessary tendency to call attention to appellant's failure to testify? The following remarks by the prosecutor in closing argument were held not to be a reference to the defendant's failure to testify: "We don't know what goes on inside their (defendants) minds; we can't climb inside and see." *Fogarty* v. *United States*, 263 F.2d 201, 204 (5th Cir. 1959). In *Knowles* v. *United States*, *supra*, the prosecutor remarked that the defendant had every opportunity to make an explanation of his unreported income to prove it was error and to cast doubt upon it but it wasn't done, and it was so easy to do if it was the truth. The court did not find that remark to be a reference to the defendant's failure to testify. In another case the prosecutor's comment that only two people in the courtroom knew whether a certain meeting had taken place, and they were the defendants was held not to be a reference to the defendants' failure to testify. *United States* v. *De Vasto*, 52 F.2d 26, 30 (2d Cir.), *cert. denied*, 284 U.S. 678 (1931).

In *Morgan* v. *United States*, 31 F.2d 385, 388 (7th Cir. 1929) the prosecutor remarked to the jury: "What does he (defense counsel) want me to do? Does he want me to call Hust and Morgan (both defendants) to the stand before you gentlemen and have them tell you what? No the criminal laws don't permit it." That was held not to be a reference to the defendant's failure to take the stand.

As the court stated in *Langford* v. *United States*, 178 F.2d 48, 55 (9th Cir.), *cert. denied*, 339 U.S. 938 (1949):

> "Except in those special cases where it appears that the accused himself is the only one who could possibly contradict the government's testimony . . . the prosecutor may properly call attention to the fact that the testimony of the government witness has not been contradicted."

The language in the present case was a general comment on the fact that a particular government witness' testimony was uncontradicted, and the defendant was not the only one who could have contradicted it. In this case the defense presented a witness, Mrs. Andrews, who testified that appellant was her foster child and lived with her. Her testimony was offered as an alibi to the assault with intent to commit robbery charge which allegedly occurred in the early morning hours of July 20. (Tr. 106-108). Indeed it was the offering of a witness who was appellant's guardian and with whom appellant lived whose testimony supplied an alibi for the early morning hours of one day but not the next day that prompted the prosecutor's remarks about no alibi for the crimes now being considered. Cf. *Peden* v. *United States*, 96 U.S. App. D.C. 27, 223 F.2d 319 (1955).

In any event one of the court's instructions was sufficient to correct any misinterpretation that may have resulted from the comments of government counsel. The court instructed the jury that the fact the appellant did not testify should not in the slightest degree be held against him (Tr. 168). This brings to mind what Judge Augustus Hand said in *United States* v. *Di Carlo*, 64 F.2d 15, 18 (2d Cir. 1933):

> "We should be blind to realities if we supposed that juries are unconscious of the omission of a defendant to take the stand, and we think the express instruction to the jury, in this case, that this fact must not prejudice the defendant, did all that could ever be done to prevent the consideration by them of the omission in arriving at their verdict."

Although defense counsel requested the court to give the instruction to the jury concerning appellant's right not to testify, there was no request for an instruction to disregard the prosecutor's remarks here complained of. It may well have been that defense counsel did not wish to have any such instruction as a matter of trial tactics, and had the court *sua sponte* given such an instruction it would have been usurping such tactics.

V. Appellant was not denied effective assistance of counsel.

(See Tr. 119-123)

Appellant was not denied effective assistance of counsel because of his counsel's failure to have him testify. The decision was a tactical one, and agreed to by the appellant. In fact, the Court discussed this matter with the appellant on two different occasions and informed him of his right to testify or not to testify, and each time the appellant indicated that he did not want to testify (Tr. 119, 123). Such a decision may not be attacked initially, after conviction, as unwise or improvident. *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958). In *Mitchell* this Court said:

> [E]ffective assistance . . . does not relate to decisions he (the lawyer) makes in the normal course of a criminal case. 104 U.S. App. D.C. at 63, 259 F.2d at 793.

And see *Hensley* v. *United States*, 108 U.S. App. D.C. 242, 281 F.2d 605 (1960); *Frand* v. *United States*, 301 F.2d 102 (10th Cir. 1962); *O'Malley* v. *United States*, 285 F.2d 733 (6th Cir. 1961); *United States* v. *Handy*, 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953); *Casey* v. *Overlade*, 129 F.Supp. 433 (N.D. Ind. 1955).

The Court in *United States* v. *Handy, supra*, at 427, stated in response to the suggestion that trial counsel erred, *inter alia*, in not calling the defendant to the stand:

> These were all questions of the type which trial counsel in criminal cases are continually called upon to meet and which they must decide under the pressure of the trial and in the light of their best judgment at the time.

The appellant at all times indicated that he did not want to testify and did not even suggest that he had considered testifying. Counsel stated to the court that he could not allow the appellant to testify as a result of a confidential communication; however, he at no time indicated that appellant had ever expressed a desire to testify. Counsel was also informed by the court that he would not have to disclose any confidential communications (Tr. 121). Appellant's failure to voice an objection to the trial tactics of his counsel is fatal to his claim of error on appeal. *Hensley* v. *United States, supra.* In *Hensley*, this Court approved the following language of the Third Circuit in *United States* v. *Handy, supra*:

> A defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel. 108 U.S. App. D.C. at 246, 281 F.2d at 609.

Even if it is assumed that appellant was coerced not to testify and it is further assumed that counsel's action was erroneous, no error appears which warrants reversal. For a defense counsel is not to be deemed incompetent or to have rendered ineffective assistance, simply because he committed one error of judgment. Rather, only if his representation of his client is such that it shocks the conscience of the court and makes the proceedings a farce and mockery of justice will a new trial be ordered. *Mitchell* v. *United States, supra; Edwards* v. *United*

States, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958); *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 148 F.2d 667, *cert. denied*, 325 U.S. 889 (1945).

The situation in this case is similar to the problem presented in *Hester* v. *United States*, 303 F.2d 47 (10th Cir.), *cert. denied*, 371 U.S. 847 (1962), where the court stated at 49:

> In the case at bar the prosecution presented a careful and complete case to which appellant apparently had no answer. Neither vigor nor skill can overcome truth. Success is not the test of effective assistance of counsel.

This same issue was presented to this Court in *Kearney* v. *United States*, No. 17837, *affirmed* by order dated October 9, 1963, *cert. denied*, 376 U.S. 918 (1964). The instant case is even stronger for the Government because in *Kearney* the appellant indicated that he wished to testify at one stage of the trial and later decided not to testify relying upon his counsel's advice.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
DANIEL A. REZNECK,
GERALD E. GILBERT,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 729619 915